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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED PARTNERSHIP, On behalf of Itself and all others similarly situated, Plaintiff, -v- LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP, Defendants.	Case No.: 07-cv-2245-BTM-NLS **CLASS ACTION** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION** DATE: August 15, 2008 TIME: 11:00 a.m. JUDGE: Hon. Barry Ted Moskowitz CTRM: 15 (5th Floor)
FRANK CHAREK, Individually and on behalf of all others similarly situated, Plaintiff, -v- LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA, Defendants.	Case No.: 07-cv-2256-BTM-NLS

[Caption continued on next page]

DEVAY CAMPBELL, Individually and on behalf of all others similarly situated, Plaintiff, -v- LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA, Defendants.	Case No.: 07-cv-2297-BTM-NLS

Class Members Westchester Capital Management, Inc. and Green & Smith Investment Management L.L.C. (together "Westchester Capital") submit this memorandum in support of their motion for reconsideration of the Court's May 22, 2008 Order Granting Motions to Consolidate, Appointing New Jersey Carpenters Pension and Benefit Fund as Lead Plaintiff, and Approving Lead Counsel Selection (the "Lead Plaintiff Order"). Westchester Capital seeks reconsideration of that part of the Lead Plaintiff Order that appointed the New Jersey Carpenter Pension and Benefit Funds (the "Carpenter Funds") as the Lead Plaintiff and approved their selection of Lead Counsel.

I. INTRODUCTION

In late 2007, three federal class actions were filed on behalf of all persons or entities who purchased the securities of LEAP Wireless International Inc. during the period from May 16, 2004 to November 9, 2007 (the "Class Period"), pursuing remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Pursuant to the provisions of the Private Securities Litigation Reform Act, on January 28, 2008, Westchester Capital filed its Notice of Motion and Motion by Class Members Westchester Capital Management, Inc. and Green & Smith Investment Management L.L.C. for the Consolidation of All Related Actions, for Appointment as Lead Plaintiff and for Approval of Lead Plaintiff's Selection of Lead Counsel. A competing motion was filed by the Carpenter Funds.

After the competing motions were fully briefed, but without hearing oral argument, the Court granted the motions to consolidate and appointed the Carpenter Funds as the Lead Plaintiff in the litigation. The Court also approved the Carpenter Funds' selection of Lead Counsel. In appointing the Carpenter Funds as the Lead Plaintiff, the Court found that Westchester Capital had not established that it had "authority to sue on behalf of the funds." Lead Plaintiff Order at 5 (*see* the accompanying Certification of Karin E. Fisch ("Fisch Cert."), Ex. A). The Court disagreed with the reasoning of those courts that have held that if an investment advisor has unrestricted decision-making authority in connection with its clients' accounts, then it has standing to sue in its own right for losses in those accounts. *Id*. The Court further found that certain language in the statements of Roy Behren, the Chief Compliance Officer of Westchester Capital and the underlying funds, cast doubt on whether there had been a "specific grant of authority to sue on behalf of the funds." *Id.* at 7. The Court did not cite to any evidence submitted by the Carpenter Funds refuting Mr. Behren's statement, issued as Chief Compliance Officer, that Westchester Capital had authority to commence litigation on its own behalf *and* on behalf of the underlying funds. The Court also expressed concern with the fact that certain of the underlying funds were foreign entities. *Id.*

Plaintiff now seeks reconsideration of the Lead Plaintiff Order because (1) the losses of the two domestic funds on whose behalves Westchester Capital moved greatly exceed those of the Carpenter Funds and (2) these funds have confirmed their longstanding grant of authority to Westchester Capital to pursue class action litigation, in general, and this action, specifically, on their behalves.

II. DISCUSSION

A. Foreign Plaintiffs Are Routinely Appointed As Lead Plaintiffs

In the Lead Plaintiff Order, the Court suggested that appointing a foreign fund as lead plaintiff may complicate a case. Here, however, Westchester Capital, the actual movant, is not a foreign entity. Westchester Capital, including those officers and employees who will be responsible for the oversight of the litigation and communications with attorneys, is located in New York. Furthermore, in *In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147 (D. Del. 2005), the decision appointing lead plaintiff points out that many courts have approved foreign investors as lead plaintiffs in cases such as this (citing *Blechner v. Daimler-Benz AG*, No. 04-CV-331, slip op. at 1-2 (D. Del. Sept. 16, 2004); *In re Nortel Networks Corp. Sec. Litig.*, No. 01 Civ. 1855, 2003 U.S. Dist. LEXIS 15702, at *4 (S.D.N.Y. Sept. 8, 2003); and *In re Goodyear Tire & Rubber Co. Sec. Litig.*, No. 5:03CV2166, 2004 U.S. Dist. LEXIS 27043 (N.D. Ohio May 12, 2004)). The court explained, "the notion that a 'non-domestic . . . investment firm' is 'an uncommitted and uncontrollable candidate for lead plaintiff' has been expressly rejected as 'insupportable.'" *Molson*, 233 F.R.D at 152 (quoting *Goodyear*, 2004 U.S. Dist. LEXIS 27043, at *24).

Even if this Court were to reject the reasoning of the courts that routinely appoint foreign entities as lead plaintiffs, the losses of The Merger Fund, a Massachusetts business trust, account for over 88% of the approximately $7.5 million in losses of the funds advised by Westchester Capital. Fisch Cert., Ex D. The losses of this one fund alone are significantly higher than the approximately $250,000 in losses suffered by the Carpenter Funds. There is certainly nothing precluding this Court from appointing one member of a group as the Lead Plaintiff.

B. Westchester Capital Had and Has Authority to Pursue This Litigation

In support of its motion, Westchester Capital submitted the Certification of Roy Behren, the Chief Compliance Officer of Westchester Capital and the underlying funds, declaring, under penalty of perjury, that Westchester Capital had "*unrestricted* decision-making authority with respect to the funds they advise and manage"; that he was authorized to take all actions on behalf of the funds "including the right to commence legal actions . . . and the right to seek to serve as lead plaintiff in an action brought pursuant to the federal securities law"; and that Westchester Capital was attorney-in-fact "to take *all* actions" on behalf of the funds. Fisch Cert., Ex. E (emphasis added). This statement from the officer charged with overseeing compliance issues for the funds was not contradicted by any evidence submitted by the Carpenter Funds and the Court cited to no specific underlying fund documents in the Lead Plaintiff Order that would cause anyone to doubt Mr. Behren's assertion.

Instead, the Court focused on Mr. Behren's statement, in his subsequent declaration, that it was his further belief that the law granted to Westchester Capital the right and standing to commence legal action on its own behalf. Fisch Cert., Ex. F ¶ 4. Thus, Mr. Behren confirmed that, in addition to his belief that he had authority by virtue of the underlying fund documents, he also had authority conveyed as a matter of law. This Court expressed it disagreement with courts holding that investment advisors may serve as lead plaintiffs based on the losses of their clients and stated its opinion that an investment advisor "must show that its client specifically authorized it to bring securities laws claims on their behalf." Fisch Cert., Ex. A at 7-8. But by focusing on that part of Mr. Behren's declaration that contained his statement as to his belief about the law, with which the Court ultimately disagreed, the Court overlooked Mr. Behren's unequivocal statements, as Chief Compliance Officer, that Westchester Capital had unrestricted decision-making authority as to all matters and was authorized to take the actions taken on behalf of the funds. In fact, as pointed out in Westchester Capital's briefing on its original motion, it has been appointed as Lead Plaintiff in a case currently pending in the Southern District of New York before the Honorable Naomi Rice Buchwald in which there has been absolutely no issue raised with respect to the authority of Westchester Capital. *In re Imax Corp. Sec. Litig.*, 240 F.R.D. 88 (S.D.N.Y 2007).

Subsequent to and in an effort to correct any misconception created by the Lead Plaintiff Order, the funds have confirmed their longstanding belief that Westchester Capital had authority under any and all of the relevant management agreements to commence litigation. Fisch Cert., Ex. B (domestic funds).

III. CONCLUSION

For the foregoing reasons, Westchester Capital respectfully requests that the Court reconsider that portion of the Lead Plaintiff Order that appointed the Carpenter Funds as the Lead Plaintiff and approved the Carpenter Funds' selection of counsel. Given the size of the losses of The Merger Fund, which are greater by far than the losses of the Carpenter Funds, Westchester Capital is presumptively the most adequate plaintiff. No evidence has been presented to rebut that presumption.

DATED: June 23, 2008

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